No. 84-910

Office-Supreme Court, U.S.
FILED
JAN 9 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BUFFALO BROADCASTING COMPANY, INC., KID BROADCASTING CORPORATION, KWTX BROADCASTING COMPANY, INC., METROMEDIA, INC. and STORER BROADCASTING COMPANY, On Behalf Of Themselves and All Persons or Entities Who Own Local Television Stations Which Obtain Music Performance Rights Pursuant to Music License Agreements With American Society of Composers, Authors and Publishers and/or Broadcast Music, Inc.,

Petitioners,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, STANLEY ADAMS, as President of American Society of Composers, Authors and Publishers, CY COLEMAN, HAL DAVID, FAMOUS MUSIC CORP., MCA, INC., MORTON GOULD, SHAPIRO, BERNSTEIN & CO., INC., On Behalf of Themselves and All Other Members of American Society of Composers, Authors and Publishers, BROADCAST MUSIC, INC., AL GALLICO MUSIC CORP., PAUL ANKA, JERRY BOCK, SHELDON HARNICK, HOLLIS MUSIC, INC., and UNART MUSIC CORP., On Behalf of Themselves and All Other Affiliates of Broadcast Music, Inc.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS AL GALLICO MUSIC CORP., SHELDON HARNICK, HOLLIS MUSIC, INC., UNART MUSIC CORP. AND THE CLASS OF AFFILIATES OF BROADCAST MUSIC, INC. IN OPPOSITION

Of Counsel:

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January 9, 1985

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Al Gallico Music Corp., Sheldon Harnick, Hollis Music, Inc., Unart Music Corp. and the Class of Affiliates of Broadcast Music, Inc.

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Respondents Al Gallico Music Corp., Sheldon Harnick, Hollis Music, Inc., Unart Music Corp. and the class of all persons or entities from which Broadcast Music, Inc. ("BMI") has obtained the right to license performing rights to third parties (the "BMI affiliates") respectfully request that this Court deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Second Circuit, entered on September 18, 1984, in this case.* The judgment of the Court of Appeals reversed the judgment of the United States District Court for the Southern District of New York, entered on January 4, 1983. The opinion of the Court of Appeals is reported at 744 F.2d 917 and is set forth at Appendix A to the petition at 1a-39a. The opinion of the District Court is reported at 546 F. Supp. 274 and is set forth at Appendix B to the petition at 40a-86a.

REASONS WHY THE PETITION SHOULD BE DENIED

The respondent class of BMI affiliates joins in the brief of respondent BMI in opposition to the petition for a writ of certiorari and urges that the petition be denied.

In addition, the BMI affiliates note that, in both the District Court and the Court of Appeals, the BMI affiliates interposed substantial defenses to petitioners' claims which were separate and distinct from the defenses raised by BMI or the American Society of Composers, Authors and Publishers. At the level of the Court of Appeals, the BMI affiliates' separate defenses included, among others, the following:

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* Pursuant to Rule 28.1 of the Rules of the Supreme Court, the following information identifies the parent companies, non-wholly owned subsidiaries and affiliates of the representatives of the respondent BMI affiliates. Al Gallico Music Corp. has subsidiaries named Mainstay Music, Inc. and Mainspring Music, Inc. Unart Music Corp. was owned by United Artists Corp. at the time this action was commenced. In 1981, United Artists Corp. was sold to Metro-Goldwyn-Mayer Film Co. (now MGM/UA Entertainment Co.). In 1983, Unart Music Corp. was dissolved.

1. Since the District Court made no finding that any BMI affiliate (a) entered into any contract, conspiracy or combination in restraint of trade or (b) took any action which caused the offering by BMI of the blanket license (the alleged restraint of trade), the BMI affiliates did not violate Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Since petitioners failed to prove at trial either (a) the alleged common issue upon which the tentative certification of the defendant class of all BMI affiliates was based (ie. that each BMI affiliate "split" the licensing of performing rights and synchronization rights by granting only synchronization rights to program producers) or (b) the liability of any BMI affiliate, the defendant class should have been decertified or dismissed.

3. The District Court's conclusory declaration that the BMI affiliates were guilty of copyright misuse was unsupportable by law and unsupported by any finding of fact.

The BMI affiliates believe each of their defenses to be sound, and believe they would prevail on their defenses even should the blanket license offered by BMI be found to be a restraint of trade. However, having ruled that the blanket license did not constitute a restraint of trade, the Court of Appeals did not find it necessary to rule on the separate defenses raised by the BMI affiliates. Accordingly, the BMI affiliates request that any disposition, other than denial, of the petition under consideration take into account the existence of their substantial unresolved defenses.

CONCLUSION

For the reasons set forth in respondent BMI's brief in opposition, the petition for a writ of certiorari should be denied.

Dated: New York, New York
January 9, 1985

Respectfully submitted,

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